

SOUTH AFRICA / JUDGMENT

Van Deventer v Deutsche Securities (PTY) Ltd (JS 183/2019) [2022] ZALCJHB 337 (15 November 2022) [2022] ZALCJHB 337

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JS 183/2019

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JS 183/2019

In

the matter between:

LARISSA
VAN
DEVENTER
Applicant
And
DEUTSCHE
SECURITIES (PTY) LTD
Respondent

Heard:

13 October 2022

Delivered:

15 November 2022

This

judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 15 November 2022.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant approached this Court for relief in terms of the provisions of section 77(3) of the Basic Conditions of Employment Act[1] (BCEA). The Applicant's case is that she is entitled to further severance pay, to be calculated with reference to her previous period of employment, taking into consideration the correct legal interpretation of her contract of employment, the employee handbook

and the provisions of the BCEA.

[2] The Respondent opposed the matter and the gist of its opposition is that the Applicant's interpretation of the relevant provisions is incorrect.

[3] The Applicant adduced evidence and at the close of the Applicant's case, the Respondent closed its case without adducing any evidence.

Background

[4] It is evident from the pre-trial minute that the following facts are common cause:

4.1. That the Applicant took up employment with the Respondent, in terms of a written contract of employment dated 21 July 2008. The Applicant was employed as a Research Analyst (Insurance), with the corporate title of 'Vice President';

4.2. The Applicant resigned from the Respondent's employ on 31 May 2013;

4.3. In August 2016, the Respondent made the Applicant an offer of employment for the position of Research Analyst (Insurance), with the corporate title of 'Director';

4.4. The Applicant accepted the offer and commenced employment with the Respondent with effect from 1 December 2016, as expressly agreed to in a written contract of employment;

4.5. The Respondent issued a section 189(3) of the Labour Relations Act[2] (LRA) notice on 23 May 2018. A section 189A process was followed, which was facilitated by a CCMA commissioner. The process was fair and in compliance with the provisions of the LRA;

4.6. On 23 July 2018, the Applicant was advised that she would be dismissed due to the Respondent's operational requirements and she was dismissed with effect from 31 July 2018;

4.7. Upon her dismissal, the Applicant was paid severance pay of two months' remuneration, calculated for the period between December 2016 and July 2018, rounded up to the nearest year.

The Applicant's claim

[5] It is common cause that the Applicant was employed by the Respondent for the following periods:

1. September 2008 to June 2013 (first term of employment): four years and ten months; and
2. December 2016 to July 2018 (second term of employment): one year and eight months.

[6] The Applicant was paid severance pay in respect of the second term of employment upon the termination of her services in July 2018.

[7] The Applicant seeks, in addition to the severance pay that she received, the payment of further severance pay in respect of the first term of her employment, thus for a period of four years and ten months and in the sum of R 1 197 050,93.

[8] The Applicant's claim is premised on the terms of her contract.

[9] The contract of employment the Applicant entered into in 2016, provides in paragraphs 2 and 3 thereof that:

'Your employment will be on the terms and conditions set out below and, save as may be varied hereby, those contained in the Deutsche Bank Employee Handbook, Compliance and Procedures Manuals (as amended from time to time), which will be given to you when you take up employment. In the event of conflict between the terms of this letter dated 8 August 2016 and these Manuals, the terms of this letter shall prevail.

Insofar as your employment is governed by the Basic Conditions of Employment Act (the Act) as amended from time to time, all the provisions thereof are applicable to your employment with the Company, to the extent that they are not specifically referred to herein. The provisions of the Act are not repeated in this letter but we set out the general details of employment, which will apply to all employees. The provisions of the Act can be ascertained by reference to the Act itself, a copy of which is available for your inspection.'

[10] The Applicant's contract did not make any specific provision for severance pay in the event of retrenchment. Clause 2.1.10.2 of the Respondent's 'Employee Handbook' (handbook) provides specifically for severance pay as follows:

'In the event that retrenchments are unavoidable, the Company shall compensate affected employees on the following basis:

- Notice pay, in the event that you are not required to work your notice period
- Severance pay equivalent to 1 (one) month's guaranteed remuneration for each year of completed service up to a maximum of 14 (fourteen) months. Prorated portions will apply for part years completed service
- Accrued leave pay, if any, as at the date of dismissal.

Although the above amounts exceed the minimum payments referred to in section 41 of the BCEA, the Company will consult with any affected employees on the severance pay to be paid should retrenchments ultimately be implemented.

The Company, at its sole discretion, may pay a variable compensation to an affected employee. This will be added to the “lump sum” amount.’

The evidence adduced

- [11] I will deal with the Applicant’s evidence to the extent that it is relevant to the issues this Court must decide.
- [12] The Applicant testified she was appointed as Research Analyst (Insurance), with the corporate title ‘Vice President’ in 2008. She resigned with effect from 30 June 2013, but in August 2016 the Respondent offered her the position of Research Analyst (Insurance), with the corporate title of ‘Director’. The Applicant testified that the job title and the position were the same as before, but that the scope of the position was broader. She explained that the Respondent had invited her back, as her previous role was never replaced after she had left in 2013 and she basically opened her old files and carried on with her duties, as before.
- [13] Clause 14 of the Applicant’s contract of employment made provision for a probationary period of four months, but she testified that there was not an actual probationary period. When she commenced her employment on 1 December 2016, she went to her desk and opened files, the issue of probation was never mentioned to her.
- [14] The Applicant was issued with a section 189(3) notice on 23 May 2018, which was signed by Ms Irene Nkosi, the Respondent’s head of human resources. In the notice, the proposed severance pay was inter alia set out as follows:
- ‘The Company proposes an enhanced severance pay of 1 (one) month’s remuneration (salary plus benefits) for each completed year of service. This is substantially more than the severance prescribed by South African law, which is only 1 (one) week per completed year of service.’
- [15] The Applicant testified that the notice did not indicate that ‘completed year of service’ meant ‘uninterrupted’ years of service. On 24 May 2018 at 12:55, the Applicant acknowledged receipt of the section 189(3) notice and she addressed an email to Ms Nkosi, wherein she posed the following question: “One question, please: I had 4 years and 10 months service with DB between 2008 and 2013, and by the end of the 60 days would have completed a further 1 year and 8 months since December 2016. Is my calculation correct that I will receive a total of 6 years’ compensation so 6 months’ pay? Please confirm.” The Applicant almost immediately sent another email to Ms Nkosi: “Sorry one more question – my understanding from the employee handbook is that we also get ur (sic) notice period in addition to the compensation for years worked. Is that correct?”

- [16] At 12:56 on 24 May 2018, Ms Nkosi responded to the Applicant “Yes that is correct.” It is evident from the email correspondence that on 24 May 2018 at 14:06 Ms Nkosi sent an email to the Applicant wherein she stated that “I just want to clarify that the years of service would refer to your current working period and should you have worked for DB less than 12 months before then the previous yrs (sic) of service should be included. Should there be a break in service for more than 12 months than it will be excluded...(sic)”
- [17] The Applicant responded to Ms Nkosi that “Please refer to the dates I provided to you at the beginning of the email trail. The employee handbook merely states years of service. There is no requirement of continuity.” In reply, Ms Nkosi suggested that they discuss the issue as soon as the Applicant was back in the office.
- [18] On 25 June 2018, the Applicant sent an email to Ms Nkosi, as a follow-up to their then recent conversation. The Applicant had set out why she believed that she was entitled to severance pay in respect of the period from 2008 until 2013 as well as from December 2016 until the date of retrenchment in 2018. The Applicant’s claim that she was entitled to severance pay in respect of both her terms of employment was based on:
1. her understanding was that the employee handbook was incorporated as part of her terms and conditions of employment;
 2. that the handbook stipulates that the Respondent would pay severance pay equivalent to one months’ remuneration for each completed year of service;
 3. that the employee’s handbook emphasized that the Respondent had deliberately contracted out of the minimum requirements of the BCEA;
 4. that an agreement was reached between the Respondent, represented by Ms Nkosi, and the Applicant acting personally on 24 May 2018 at 12:56 when Ms Nkosi agreed that the Applicant was entitled to 6 months’ severance pay;
 5. the circumstances which gave rise to her departure in 2013 and the fact that the Respondent invited her back to re-join her previous role; and
 6. she has been a loyal employee who went beyond what was expected of her and therefore the Respondent has to treat her fairly.
- [19] Ms Nkosi responded to the Applicant on 5 July 2018 and she denied that an agreement was reached between the Applicant and the Respondent to the effect that the Applicant would be entitled to six months severance pay because of all her years of service, which included the period September 2008 until June 2013. Ms Nkosi further stated that the Applicant left in 2013 of her own volition to pursue an opportunity with a competitor and the Applicant was approached in 2016 as the Respondent had a position it wanted to fill with someone of the Applicant’s experience and expertise. An offer was made and the Applicant accepted the offer voluntarily. The contract subsequently entered into came into effect on 1 December 2016 and there was no intention to recognise prior service.

- [20] In cross-examination, it was put to the Applicant that the issue of severance pay was clarified in an email from Ms Nkosi, wherein she explained that it would be calculated only on the second term of employment. The clarification was given very shortly after Ms Nkosi responded to the Applicant's question. The Applicant insisted that it was not a clarification, but a reversal of an agreement.
- [21] It was also put to the Applicant that the contract that she had signed in 2016 provided for a probation period, which is indicative of the fact that it was a new employment relationship and not merely a continuation of the first contract. The Applicant responded that the probation was a mere formality and it did not concern her.
- [22] It was also put to the Applicant that when she entered into the new contract in 2016, there was no meeting of the minds that there was a continuity of employment or that she would benefit from a prior employment period. The Applicant's response was that these issues did not come up.
- [23] In respect of her claim that the employee handbook entitles her to severance pay, as claimed, it was put to the Applicant that there is nothing in the employee handbook which excluded the operation of section 41 of the BCEA. The Applicant agreed that it was not excluded.
- [24] The Applicant's case is that no matter the period of the breach in employment, upon termination for operational reasons, an employee is to be rewarded for all periods of employment to compensate employees for loyal service. Mr Malan put it to her that the Respondent would never agree to such a position and that the employee handbook cannot be interpreted in accordance with the Applicant's understanding and expectations.
- [25] In cross-examination, the Applicant conceded that she resigned in 2013 to take up a position at Barclays Bank, which at director level, was a promotion.

Analysis

- [26] The dispute before this Court is a contractual one and must be decided by applying the principles applicable to contractual disputes. For the Applicant to succeed with her contractual claim, she must show that there was indeed a breach of contract when the Respondent failed to pay her severance pay in respect of her first period of employment.
- [27] The Applicant's case is premised on the provisions of clause 2.1.10.2 of the employee handbook which provides for the payment of severance pay equivalent to 1 (one) month's remuneration for each year of completed service. The contentious question is the meaning and interpretation of 'year of completed service'.
- [28] The Applicant's case is that it is to be understood and interpreted to mean that upon termination of an employment contract for operational reasons, an employee is to be rewarded for all periods of employment, irrespective if there was a breach in service or the period of such a breach in employment. The Respondent's case on the other hand is that the

payment of severance pay is subject to the provisions of the BCEA and does not include all and any periods of prior employment with the Respondent. The clause is to be interpreted in accordance with sections 41 and 84 of the BCEA.

[29] The Supreme Court of Appeal (SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] affirmed the principles applicable to the interpretation of legislation and contracts. What the judgment underscores is that the exercise of interpretation does not require a court to discern the intention of the legislature or the parties to a contract only by reference to the plain meaning of words with a deferential nod, if necessary, in the direction of the Oxford English Dictionary, as was said at paragraph 18:

'The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document... The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

And further at paragraph 26:

'In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration'.

[30] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,[4] the SCA also considered the principles applicable to the interpretation of legislation and contracts and held that:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and

surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is “essentially one unitary exercise...”

[31] In *University of Johannesburg v Auckland Park Theological Seminary and Another*,^[5] the Constitutional Court held that:

‘[66] The approach in *Endumeni* “updated” the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous.

A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances

leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.

[67] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. As the Supreme Court of Appeal held in *Novartis*:

“This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the

parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it... A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.”

[68] Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court’s recourse to extrinsic evidence is not limitless because “interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses”. It is also true that “to the extent that evidence may be admissible to contextualise the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible”. I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.’ (Footnotes omitted)

- [32] These are the principles to be applied in considering the merits of this case.
- [33] In argument, Mr Posthumus for the Applicant made much of the fact that the Respondent did not adduce any evidence regarding the interpretation of the Applicant's contract or the provisions of the handbook.
- [34] In casu, the onus is on the Applicant to prove the contractual terms, the breach thereof and she has to show that she is indeed entitled to the relief she seeks.
- [35] The fact that evidence was not adduced to contradict the Applicant's version does not necessarily mean that her version will be or must be accepted. Whether it is accepted, depends on the probative strength of the evidence and the question is whether the evidence was strong enough to cast an evidential burden on the party failing to provide evidence. Ultimately, it is the application of the relevant standard of proof to all the facts of the case that determines whether a party's failure to give evidence

or to call a witness will be fatal. The effect of the failure to testify will depend on the individual circumstances of every case.

The failure to give or adduce evidence does not shift the burden of proof.

- [36] Mr Malan for the Respondent submitted that the Applicant's understanding of the relevant clauses and her interpretation thereof constitutes no more than her opinion and it has no evidential value. The ultimate question is whether the Applicant could establish a contractual claim. The interpretation of the contractual terms is a process to be undertaken by this Court.

Meeting of the minds

- [37] The Applicant's pleaded case is that she is entitled to the severance pay she claims because the text of the employee handbook does not include 'uninterrupted' service, but merely refers to years of completed service. Before I deal with the interpretation of the contentious clause in the handbook, there are two issues that came up during evidence and argument that is to be addressed.
- [38] During her evidence, the Applicant testified that she is entitled to the severance pay she claims because there was an agreement to that effect. This agreement was reached between the Respondent, represented by Ms Nkosi, and the Applicant acting personally on 24 May 2018 at 12:56 when Ms Nkosi agreed that the Applicant was entitled to 6 months' severance pay.
- [39] As alluded to supra, this Court must consider the context and purpose, which would include pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. This Court must consider all the

circumstances surrounding the alleged agreement and examine all the facts and the context, in order to determine what the parties

intended.

- [40] What is evident is that the Applicant posed a question to Ms Nkosi as to whether her calculation that she would receive a total of 6 years' compensation was correct and almost immediately the Applicant posed another question regarding her understanding that she would get her notice period in addition to the compensation for years worked. Within minutes Ms Nkosi responded to the Applicant "Yes that is correct." However, Ms Nkosi sent another email to the Applicant wherein she clarified that the years of service would be the Applicant's current working period and that should there be a break in service for more than 12 months, it would be excluded.
- [41] It is evident that the Applicant subsequently engaged Ms Nkosi regarding the dates that she had provided and the provisions of the handbook, upon which Ms Nkosi suggested that they discuss the issue as soon as the Applicant was back in the office.
- [42] A discussion took place, whereafter the Applicant sent an email to Ms Nkosi, setting out why she believed that she was also entitled to severance pay in respect of the period from 2008 until 2013. She recorded that an agreement to that effect was reached on 24 May 2018 at 12:56 when Ms Nkosi agreed that the Applicant was entitled to 6 months' severance pay. Ms Nkosi responded and she denied that an agreement was reached between the Applicant and the Respondent to the effect that the Applicant would be entitled to six months' severance pay because of all her years of service.
- [43] Ms Nkosi explained that the Applicant also asked if she would get notice pay in the event that she was retrenched, which was the query she responded to and which she confirmed to be correct. At that point, she did not consider the severance pay issue, but later in the day she responded to that and clarified the issue.
- [44] This issue was dealt with in cross-examination and it was put to the Applicant that the issue of severance pay was clarified in an email from Ms Nkosi, wherein she explained that it would be calculated only on the second term of employment. The Applicant insisted that it was not a clarification, but a reversal of an agreement.
- [45] In *Universal Church of the Kingdom of God v Myeni and others*,^[6] the Labour Appeal Court (LAC) held that:

'Firstly, there was no suggestion on behalf of Mr Myeni that the documents incorporated any legally binding agreement between him and the church. Secondly, even if there was, it would not pass muster in terms of compliance with formal and essential requirements of a valid contract. It is settled law that the intention of the parties in any agreement — express or tacit — is determined from the language used by the parties in the agreement or from their conduct in relation thereto. Further, not every agreement constitutes a contract. For a valid contract to exist, each party needs to have a serious and deliberate intention to contract or to be legally bound by

the agreement, the animus contrahendi. The parties must also be ad idem (or have a meeting of minds) as to the terms of the agreement.

Obviously, absent the animus contrahendi between the parties or from either of them, no contractual obligations can be said to exist and be capable of legal enforcement.’

[46] The evidence presented and the facts of this case show that the parties never entered into any legally binding agreement with one another on 24 May 2018 regarding the payment of severance pay. The alleged agreement does not pass muster to constitute a valid contract with any legally binding effect. I say so for several reasons.

[47] The documentary evidence shows inter alia that there was ongoing correspondence between the Applicant and Ms Nkosi wherein the calculation of the Applicant’s severance was addressed. In the correspondence, the period for which severance pay was to be paid, was queried, and it was clearly a subject of discussion and disagreement, with no final agreement on it.

[48] Ms Nkosi explicitly denied that an agreement was reached, and she provided context to the query she was responding to. On the Applicant’s version, Ms Nkosi’s clarification constituted a reversal of an agreement. If further clarification was required, there was no binding agreement, as mere clarification cannot reverse a binding agreement.

[49] It is evident that the parties never reached an agreement on the payment of severance pay for the period from 2008 until 2013 and that it remained an aspect the parties were still engaging on, with different views and interpretations and no final agreement was reached on that.

[50] The parties were not ad idem and there was no meeting of minds as to the payment of severance pay for the the period from 2008 until 2013. Absent the animus contrahendi between the parties, or from either of them, no contractual obligations can be said to exist and be capable of legal enforcement.

[51] I cannot but find that the Applicant failed to establish that an agreement that she would be paid six months’ severance pay came into existence on 24 May 2018.

[52] During argument, Mr Posthumus submitted that considering the context within which the second contract was entered into, there was clearly a continuation of the Applicant’s employment. The Applicant was invited back to the Respondent, to effectively the same position she previously held, except that it had a widened scope because the Applicant had gained more experience. The probation period provided for in the Applicant’s contract of employment, was never effected and the true purpose of the second offer of employment was to get the Applicant back. Although the second contract did not acknowledge the Applicant’s previous service with the Respondent, the invitation and the intention were clearly to get her back to her old position and as such, the second contract was a continuation of the Applicant’s service.

[53] This argument is no doubt presented to address the wording of section 41(2) of the BCEA, which the Respondent relied upon in its defence.

[54] The difficulty with the argument so presented is two-fold. Firstly, it is not the Applicant's pleaded case that her second contract of employment constituted 'continuous' service, as contemplated in section 41(2) of the BCEA. In fact, her pleaded case is that, on a proper interpretation of clause 2.1.10.2 of the handbook, she is entitled to one months' remuneration for each full year of service she completed with the Respondent.

[55] Jacob and Goldrein[7] aptly capture the position in respect of pleadings as follows:

'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings...

For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.

The Court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim of defence not made by the parties...

The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.'

[56] The Applicant has to present a case to this Court in accordance with her pleadings and as such, she has to show that she is entitled to one months' remuneration for each full year of service she completed with the Respondent, based on the interpretation of clause 2.1.10.2 of the handbook. Her pleaded case is not that she is entitled to it because her employment was continuous.

[57] The second difficulty with the argument is that it is not supported by the evidence. The second contract was a new contract of employment, with a probation clause and no indication whatsoever that it constituted a continuation of the Applicant's previous employment or even a recordal that her previous period of employment was recognised or that she would benefit from a period of previous employment.

[58] Mr Posthumus submitted that if this Court finds that the second contract was a new contract, 'continuation' will not find application as the handbook did not provide for that. What remains to be decided, is whether the Applicant's interpretation of clause 2.1.10.2 of the handbook is to be accepted and whether she is entitled to the relief she seeks.

The arguments

- [59] The Applicant's pleaded case is that she is entitled to the severance pay she claims because the text of the employee handbook does not include 'uninterrupted' service, but merely refers to years of completed service.
- [60] The Applicant's case is that the first term of her employment should be considered for purposes of calculating her severance pay, based on her understanding that she is entitled to severance pay "for each year of completed service".
- [61] The Applicant's claim for the payment of further severance pay centres around the wording of clause 2.1.10.2 of the handbook, which provides for the payment of "severance pay equivalent to 1 (one) month's guaranteed remuneration for each year of completed service".
- [62] Effectively her case is that the handbook provides for completed years of service and that there is no limitation to 'continuous years of service' and the payment of severance pay is therefore not restricted as there is no provision or requirement that the employment had to be 'continuous.'
- [63] Mr Posthumus submitted that by agreeing to pay substantially more severance pay than what the BCEA requires, the Respondent contracted

out of the BCEA and in fact "intended to waive the requirements of the BCEA". In support of this argument, Mr Posthumus referred to SATU (obo Van As and other) v Kohler Flexible Packaging (Cape) (a division of Kohler Packaging Ltd)[8] (SATU). Mr Posthumus submitted that the LAC has endorsed the approach that the method of calculating severance pay prescribed in the BCEA,

applies only when severance pay is paid in accordance with the BCEA. It does not apply if the parties agree on severance pay in excess of the statutory minimum.

- [64] In SATU, the LAC held that[9]:

'[18] Section 35(5) of the Act, in any event, expressly provides that it applies only to the calculation of severance pay in terms of Section 41 of the Act. Section 41(2) of the Act deals with the minimum severance pay.

- [19] Mr Whyte conceded that there was no agreement as to whether the shift allowance should be included in the severance package or not. He, however, argued that the agreement that the employees would receive "two weeks" salary per completed year of service brings the agreement of retrenchment within the ambit of Section 41(2) of the Act. Accordingly, he argued that the calculation of the severance pay had to be effected in accordance with Section 35 of the Act.

- [20] The effect of this argument is rather startling. If I have to accept this argument it will mean that if any employer ever had to express the amount of severance pay in multiples of “weeks”, Section 41(2) would find application, irrespective of whether the amount paid by means of a severance package exceeds the minimum stipulated for in Section 41(2) of the Act, or not.
- [21] The purpose of the legislation is clear. It creates a statutory minimum that has to be paid when an employee is dismissed for reasons based on the employers operational requirements. The only logical interpretation that can be given to the words “at least” in Section 41(2) of the Act is that it should mean “not less than”. In my view the section is aimed at providing a safety net of a minimum of one week’s pay per year of completed continuous service. Section 189(2)(c) of the Labour Relations Act 66 of 1995 requires parties to consult over severance pay. The aim of the consultation is to reach consensus. In the context of severance pay this can logically only mean consensus on the payment of more than the guaranteed statutory entitlement.’
- [65] Mr Posthumus’ reliance on SATU is misplaced. The LAC confirmed that section 41(2) of the BCEA provides a minimum severance pay and if the parties agreed to more than the guaranteed statutory entitlement, the formula to calculate remuneration, as provided for in section 35 of the BCEA, would not apply.
- [66] The Respondent’s case is that clause 2.1.10.2 of the handbook must be interpreted in accordance with the provisions of the BCEA. The Applicant was entitled to one month’s remuneration for each completed year of service and that the length of service was to be calculated in accordance with section 84 of the BCEA.

Interpretation

- [67] The issue to be decided turns on the interpretation of the words ‘completed service’, as used in clause 2.1.10.2 of the handbook.
- [68] It is evident from the Applicant’s contract of employment that her employment is governed by the BCEA and that all the provisions thereof are applicable to her employment with the Respondent, to the extent that they were not specifically referred to in her contract.
- [69] The employee handbook is also in compliance with the provisions of the BCEA. In clause 2.1.10.2 of the handbook, severance pay is provided for. It is the equivalent of one month’s remuneration for each completed year of service and it records specifically that the Respondent’s severance pay exceeds the minimum payment provided for in section 41 of the BCEA.
- [70] The relevant portion of section 41(2) of the BCEA provides that:
- ‘An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements...severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer...’

- [71] Section 41(2) also provides that severance pay be calculated in accordance with the provisions of section 35 of the BCEA.
- [72] Section 41(2) of the BCEA provides the default position, but nothing prevents an employer from paying above the statutory minimum. Where the employer pays more than the statutory minimum, the section 35 calculation would not apply, unless the parties agreed to it.
- [73] In *Barrier v Paramount Advanced Technologies (Pty) Ltd*[10] (*Barrier*), the LAC considered the issue of severance pay and held that:
- ‘[32] It is generally accepted that a fair severance allowance, upon the termination of employment for operational requirements, is one based (at least) on the employee’s length of employment with the employer and his (or her) remuneration.
- [33] Section 41(2) of the BCEA deals with severance pay. The section in particular (as has been mentioned above, albeit in paraphrasing) provides as follows: “An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements, or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act 24 of 1936) severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.”
- [34] The section is relatively unambiguous. An employer who dismisses an employee, inter alia, for operational reasons is obliged to pay that employee severance pay, the amount of which, at least, must be equal to one week’s remuneration for every completed year of continuous service with that employer.
- [35] Section 35, which is referred to in s 41(2), deals with the calculation of remuneration, and it specifies, inter alia, how an employee’s remuneration is to be calculated, what forms part of such remuneration for the purposes of the calculation, etc. Since the dispute in this matter focuses on different, albeit tangentially aligned points, no more needs to be said about the section at this juncture. Section 35 does not really assist in determining the other main aspect arising from s 41(2), in particular, the length of the employee’s service or employment with a particular employer.’
- [74] In *casu*, the Respondent agreed to pay more than the minimum severance pay prescribed in the BCEA. The effect of this is that section 35 of the BCEA would not apply, as was also confirmed by the LAC in *SATU*. However, an employer remains liable to pay severance pay to a retrenched employee equal to one week’s remuneration for each completed year of continuous service with that employer. The years of service are calculated in accordance with section 84(1) of the BCEA.
- [75] In *Barrier*, the LAC considered the phrase ‘continuous service as follows:

[36] The phrase “continuous service” is not expressly defined in the BCEA, and a meaning would have to be given to it. Closely aligned to the meaning of that phrase is the question of the duration or length of service. Section 84 of the BCEA deals with that aspect.

[37] Section 84(1) specifically provides that the section is applicable where the length of an employee’s employment with a specific employer is to be determined “for any provision of the Act”. Since the length of an employee’s employment with a particular employer would have to be determined for compliance with s 41(2) of the BCEA, s 84 would be applicable, in particular, where there has been a “break” or “interruption” in the course of the employee’s employment with the particular employer. This was also the conclusion (effectively) of the arbitrator and of the court in Rogers, the correctness of which the court a quo also accepted.

[38] Section 84(1), in particular, provides:

“For the purposes of determining the length of an employee’s employment with an employer for any provision of this Act, previous

employment with the same employer must be taken into account if the break between the periods of employment is less than one year.”

[39] The section, like s 41(2) of the BCEA, is relatively clear and unambiguous. Section 41(2) has to be read in light of and consistently with s 84(1) of the BCEA. The latter section qualifies and assists in the interpretation of the former.

[40] Section 84(1) does qualify the ordinary, dictionary meaning of “continuous”, and effectively provides that, even though there is a break or interruption in the course of the employment, for the purposes of determining the length of service, the break or interruption is inconsequential if it is less than one year. In that sense, it gives a special meaning to the phrase “continuous service” found in s 41(2).

[41] Thus, for the purpose of determining the length of service, a break of less than a year is not regarded as consequential in determining whether the service was continuous. Section 84(1) creates a fiction in that regard because the ordinary dictionary meaning of “continuous” is “uninterrupted” or “without a break”. However, having stated that, breaks are not altogether irrelevant, as we shall see when dealing with s 84(2).

[42] What is significant about s 84(1), in the light of the issues in the present matter, is that it requires, for the purpose of determining the length of the employee’s service with a particular employer, that all the periods of employment of the employee with that employer be taken into account, provided that the break between those periods of service is less than one year. What is also noteworthy is that the length or duration of the break determines whether the period immediately preceding the break is to be taken into account in determining the length of service.’

- [76] The Applicant's interpretation of clause 2.1.10.2 of the handbook is that for completed years of service and that there is no limitation to 'continuous years of service' and the payment of severance pay is therefore not restricted as there is no provision or requirement that the employment had to be 'continuous.'
- [77] It may be so that clause 2.1.10.2 does not mention 'continuous', but that is not the be all and end all of the provision relating to the payment of severance pay. Clause 2.1.10.2 of the handbook cannot be interpreted in isolation but must be interpreted with reference to the Applicant's contract of employment and the handbook as a whole. In applying the principles applicable to the interpretation of contracts, it is evident from the Applicant's contract as well as the provisions of the handbook, that they are governed by the BCEA and that all the provisions thereof are applicable to her employment with the Respondent. There is no merit in the Applicant's argument that the Respondent contracted out of the BCEA or that it waived the requirements of the BCEA.
- [78] The Applicant's interpretation of clause 2.1.10.2 of the handbook is at odds with the provisions of the BCEA. The BCEA applies and governed the Applicant's employment and clause 2.1.10.2 of the handbook cannot be divorced from the provisions of the BCEA merely because the Respondent agreed to pay a higher severance pay than the statutorily prescribed minimum.
- [79] To accept the Applicant's interpretation and understanding of clause 2.1.10.2 of the handbook, will not only be at odds with the applicable provisions of the BCEA but will also lead to unbusinesslike and oppressive consequences. It could never have been the intention of the Respondent to not only pay severance pay far more generous than what it is required to do in terms of legislation but to do so also in respect of all and any period of previous employment, where there was a breach in service, no matter the period of such breach in service.
- [80] Furthermore, the LAC confirmed that section 84(1) of the BCEA specifically provides that the section is applicable where the length of an employee's employment with a specific employer is to be determined "for any provision of the Act." It is thus not limited to the determination of the length of services for purposes of severance pay. It follows that section 41(2) is to be read with section 84(1) and that for purposes of determining the length of service, service has to be 'continuous', as provided for in section 84(1) of the BCEA.
- [81] The Applicant's interpretation is not an interpretation that could be or should be accorded to clause 2.1.10.2 of the handbook, more so where the employment is governed by the provisions of the BCEA.
- [82] The Applicant failed to show that she is entitled to severance pay for the period September 2008 to June 2013 and her claim has to fail. The Respondent is not liable for the payment of further severance pay.

Costs

[83] Mr Posthumus submitted that the cost should follow the result as this is a contractual claim and there is no continuing employment relationship between the parties. Mr Malan also submitted that this is a contractual dispute and that the cost should follow the result.

[84] The LAC has held[11] that when this Court exercises its jurisdiction under section 77(3) of the BCEA, as it does in this instance, the rule established by section 162 of the LRA, to the effect that costs do not follow the result and must be determined by reference to the requirements of the law and fairness, does not apply. The rule to be applied in proceedings such as the present is that costs follow the result, save in exceptional circumstances.

[85] In casu, there are no exceptional circumstances and there is no reason to deprive the Respondent of its costs. The Applicant was misguided in proceeding with this litigation.

[86] I accordingly make the following order:

1. The Applicant's case is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv I Posthumus

Instructed by: M H Attorneys

For the Respondent: Mr F Malan from Edward Nathan Sonnenbergs Inc Attorneys

[1] Act 75 of 1997, as amended.

[2] Act 66 of 1995, as amended.

[3] 2012

(4) SA 593 (SCA) at para 18.

[4] [2014] 1 ALL SA 517 (SCA) at para 12.

[5] 2021

(6) SA 1 (CC) at para 66 - 68.

[6] (2015) 36 ILJ 2832 (LAC) at para 44.

[7] J Jacob, I.S Goldrein, 'Pleading: Principles and Practice' at p 8-9.

[8] [2002] 7 BLLR 605 (LAC).

[9] Ibid at paras 18 – 21.

[10] (2021) 42 ILJ 1177 (LAC).

[11] See *Baise v Mianzo Asset Management* (2019) 42 ILJ 1987 (LAC).

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